87-1989

No. ——

Supreme Court, U.S.
FILED
JUN 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE THEODORE B. GOULD, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, and MIAMI CENTER CORPORATION,
Petitioners

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, CHIEF BANKRUPTCY JUDGE THOMAS C. BRITTON, AND SENIOR BANKRUPTCY JUDGE SIDNEY M. WEAVER

ROBERT M. MUSSELMAN *
413 7th Street, NE
Charlottesville, Virginia 22901
Telephone (804) 977-4500
Attorney for Petitioners Holywell Corporation, Miami Center Limited Partnership, Chopin Associates and Miami Center Corporation

THEODORE B. GOULD, *pro se*
Echo Hill Farm
Garth Road
Charlottesville, Virginia 22901
Telephone: (804) 295-7125

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

4788

QUESTIONS PRESENTED

The Petitioners seek relief, through the issuance of Mandamus to the United States Bankruptcy Court for the Southern District of Florida, having filed a petition for a writ of mandamus and prohibition in the United States Court of Appeals for the Eleventh Circuit, and the petition having been denied without opinion. See Appendix hereto ("App.") at page 1a.

In the piecemeal appellate review characterizing these proceedings, the United States District Court for the Southern District of Florida has (through several different judges) taken the following actions: It has denied the Bank of New York's motion to dismiss on the grounds of mootness, concluding that effective relief could be granted, and remanded for findings of fact and conclusions of law necessary for appellate review [App. 65a, Order of December 30, 1985]; has affirmed the Confirmation Order, amended *nunc pro tunc*, based upon granting deference of the "clearly erroneous" standard of review to the prevailing party's findings of fact and conclusions of law adopted *in toto* [App. 11a, Order of March 20, 1986]; has affirmed the bankruptcy court's decision quieting title to certain chattels of the Miami Center Joint Venture leased to the Miami Center Limited Partnership, [App. 137a, Order of June 24, 1985]; has reversed the Confirmation Order, amended *nunc pro tunc*, holding that the Bank of New York's Plan was unfair and inequitable, concluding that the Miami Center Joint Venture's claim was improperly subordinated and, thus, the confirmed plan of reorganization did not satisfy 11 U.S.C. Section 1129(b)(1), [App. 144a, Order of March 24, 1987] and affirmed the bankruptcy court's order that title was conveyed without consent based upon the trustee's authority, pursuant to a provision of the plan, acting on behalf of the lessee to require the lessor's specific performance in exercise of the purchase option of unexpired leases in

default [App. 161a, Order of April 4, 1988]; has affirmed the bankruptcy court's declaratory judgment [App. 167a, Bkcy. Court Order of September 27, 1987] quieting title to certain chattels of Holywell Leasing Company and Holywell Telecommunications Company, remanded the case for further adversarial hearings and has not yet ruled on the taking of private property without consent for the Bank of New York's benefit and the subordination of valid undisputed claims [App. 170a, Order of April 27, 1987]; having heard oral argument on December 18, 1986 in the debtors' appeal [Case No. 85-2263-CIV-NCR] of the amount, validity, and priority of the Bank of New York's disputed lien, has not ruled [App. 186a, Bkcy. Court Order of March 20, 1985]; has affirmed the bankruptcy court's order granting the Trustee sole and exclusive authority over the assets of Twin Development Corporation, finding that Holywell Corporation and Theodore B. Gould were equitably estopped from denying the bankruptcy court's jurisdiction over the assets of Twin Development Corporation, a non-filed, solvent, wholly-owned corporate subsidiary of Holywell Corporation, [App. 190a, Order of February 20, 1987] and has granted a Writ of Mandamus directed to Chief Bankruptcy Judge Britton mandating his recusal.

Senior Bankruptcy Judge Sidney M. Weaver, to whom the proceedings were transferred, has, (a) without the testimony of witnesses or evidence, varied the former decree upon which the Confirmation Order's mandate was based, and has concluded that the Bank of New York was *not* an undersecured creditor, [App. 202a, Bkcy. Court Order of December 18, 1987] granting the Bank of New York a credit of $27,050,115 for post-petition interest based upon a provision of the confirmed plan providing for interest to the closing of the Miami Center's sale as a credit against the purchase price of $255.6 million; (b) ruled that Fred Stanton Smith, as Trustee

of the Miami Center Liquidating Trust, and the Trust are *not* responsible for making the income tax returns on behalf of Holywell Corporation and Theodore B. Gould's bankrupt estate and are *not* liable for payment of federal income taxes due for 1985, 1986, and thereafter as a "disbursing agent" acting on behalf of a "grantor trust", since the confirmed plan of reorganization did not provide for the payment of income taxes; [App. 204a, Order of April 28, 1988]; and entered an Order of Certification of Contempt against Theodore B. Gould, as president of Twin Development Corporation, and Robert M. Musselman, as Twin Development's attorney, for not causing the dismissal of a complaint filed in the United States District Court of the Western District of Virginia for the purpose of quieting title to the corporation's common stock and assets, seeking injunctive relief to satisfy its liabilities, particularly the payment of federal and state income taxes. [App. 218a, Order of April 17, 1988]

The Eleventh Circuit has dismissed an appeal [App. 2a] of the Order Affirming The Confirmation and Plan [App. 11a] on the grounds of mootness, having granted deference of the "clearly erroneous" standard to the Bank of New York's proposed findings of fact, adopted *in toto* by the Bankruptcy Court, that substantial consummation precluded effective relief; dismissed on the same "mootness" ground, the appeal of the Final Order Of Dismissal With Prejudice, [App. 37a] dismissing as an administrative necessity allegations of fraud under the Racketeering Influenced and Corrupt Organizations Act, usury, breach of good faith, and breach of contract, related to the Bank of New York's liability for lending malpractices; denied a Petition For Rehearing, correcting its prior decision, concluding that neither the bankruptcy court nor the district court had made an express or implied finding that the Bank of New York was a "good faith purchaser" [App. 40a, Order of September 8, 1987]; vacated its order of September 8, 1987,

denied the Appellants' Petition For Rehearing, denied a Suggestion of Rehearing In Banc, and vacated the district court's Order Affirming The Confirmation Order and Plan, March 20, 1986, ([App. 11a] remanding Case No. 96-5286 to the district court with instructions to dismiss the appeal from the bankruptcy court as moot [App. 42a]; affirmed the district court's equitable estoppel order concerning the assets of the non-filed Twin Development Corporation [App. 190a], characterizing as "frivolous" the appellants' argument that (a) the district court's adoption *sua sponte* of equitable estoppel was contrary to Rule 8(c) of the Federal Rules of Civil Procedure, (b) the assets of a corporation are not the property of its stockholders in the absence of consolidation, and without adhering to state corporation law requiring the payment of its liabilities, the assets of a corporation cannot be dividended to its stockholder to pay claims of a parent debtor or a "related" party, and (c) subject matter jurisdiction cannot be conferred by consent upon a bankruptcy court over assets not the property of the debtor's estate at the commencement of the proceedings. [App. 201a]

The questions presented in the Petition for Mandamus are as follows:

1. Did the confirmation of the Bank of New York's proposed amended consolidated plan of reorganization, without satisfying 11 U.S.C. Section 1128(a) that ". . . the court shall hold a hearing on confirmation of a plan" and 11 U.S.C. Section 1128(b) that a party in interest shall have the opportunity to object to its treatment under the proposed plan, represent conduct violative of due process of law, thus precluding the bankruptcy court from exercising its authority to confirm the plan?

2. Did the adoption *in toto* of the prevailing party's proposed findings of fact * without findings based upon

---

* In (a) the Order on Remand, January 29, 1986, amending the Confirmation Order of August 8, 1985, *nunc pro tunc*, App. 96a, in (b) the Order on Remand, November 10, 1986, amending the

credibility determinations of a witness's testimony, or physical and documentary evidence introduced by *live witnesses*, represent conduct violative of due process of law, and an abandonment of the court's duty, precluding the application of the "clearly erroneous" standard of review, *Fed. R. Civ. P. Rule 52(a)*, as applicable to adversary proceedings in bankruptcy by *Fed. R. Bankr. P. 7052*?

3. Did the confirmation of a plan of reorganization, of which a principal element was the creation without statutory authority of the Miami Center Liquidating Trust, in which, it is claimed by the plan's proponent, the debtors' Section 541(a) assets were vested, contrary to the requirement of 11 U.S.C. Section 1141(b) that the debtors' assets not specifically enumerated in accordance with 11 U.S.C. Section 1123 in Article IV, *Means For The Execution Of The Plan*, as required to implement the plan shall be revested in the discharged debtors, and under which a trustee was appointed without satisfying the predicate of 11 U.S.C. Section 1104(a), to whom the powers and authority of a "receiver" were granted, contrary to 11 U.S.C. Section 105(b), represent misconstruction of the law and usurpation of power?

4. Did substantive consolidation of the debtors' estates without consent and in the absence of a sham, alter-ego or a fraudulent transfer of assets represent the bankruptcy court's usurpation of power without statutory authority?

5. Did varying the prior findings of its former decree representing the mandate of its Confirmation Order, that ". . . the Bank of New York whose claim is undersecured," as affirmed, represent an unlawful exercise of the bankruptcy court's prescribed jurisdiction and abuse of power?

The questions presented in this Petition for Mandamus are based upon the following issues:

Confirmation Order of August 8, 1985, *nunc pro tunc*, App. 264a, and in (c) the Order on Remand on June 27, 1987.

1. Has the Eleventh Circuit's application of the "mootness" doctrine and denial of a petition for a prerogative writ of mandamus and/or prohibition sanctioned the bankruptcy court's conduct violative of due process of law, usurpation of power, misconstruction of the law, and pervasive personal bias? **

** "There are some people that there is absolutely no doing business with, *you simply roll over them or they roll over you, and Gould, in my mind, falls in that category . . . that man has to be blasted out of the way, ...*" [Bkrtcy., Chief Bankruptcy Judge Thomas C. Britton, Transcript, *Ex Parte* Conference, May 15, 1987] [Emphasis supplied] App. 337a-338a.

"Even if he signed his goddamned name to a piece of paper directing you to do something, he could very easily, and he is the kind of man who would, come into court a year or five years later and sue personally and saying that he was deceived into this and misled into it, there is a pattern that we see of this guy . . . ." [Id., App. 338a]

"—*the man is a madman*, . . . I mean, *this man is crazy, he will do anything*." [Emphasis supplied] [Id., App. 339a]

". . . one great strength that the Bankruptcy Court has . . . is that *if an order of this Court is not superseded and that order is performed*, then *it cannot be challenged any further* . . . and if we had been able to carry out the entire plan very quickly, there would have never been an appeal because they couldn't post the bond." [Id., App. 338a-339a] [Emphasis supplied]

". . . one thing I have learned about the judicial apparatus and machinery, it is a great respecter of things that are done and things that work, *no matter how screwed up they may be*. Take the entire jurisdiction of this Court. The United States Supreme Court came out with a decision saying that only an Article III judge can do what these judges do and . . . [replying to the statements of the Trustee's counsel that "they are doing the same thing they did then, in spite of the Supreme Court and in spite of Congress"] . . . exactly, and if it goes back to the Supreme Court, without any question at all the Supreme Court's going to say it is okay, in other words, they will find a way to do it because it works . . ." [Id., App. 339a-340a] [Emphasis supplied]

* * * *

"At the confirmation hearing [April 29, 1985] . . . I explained exactly what procedure I intended to follow, I took note of all of the filed objections to the plan . . . and I subsequently reviewed . . .

2. Have the Eleventh Circuit and the district court, citing *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), [App. 50a, fn. 4], improperly granted defer-

---

all of them in light of everything in front of me and reached a decision.

Now, there is no requirement that I know of that a litigant who wishes to object to a confirmation of a plan not only is entitled to have his written objection considered, but also is entitled to have somebody stand up and say them orally . . . .

I thought that the option under the law, and I think today that the option under the law is given to a court, not to a litigant, to decide when a court would be helped by hearing oral argument . . . ." [Bkrtcy., Chief Bankruptcy Judge Thomas C. Britton, Transcript, August 12, 1985, p. 44]

* * * *

"I would like very much . . . to spend a minimum of time in the process of making a record, an evidentiary record . . . I would like to hear argument . . . and I can tell . . . you that your argument . . . would probably have far, far more impact on the decision that I will reach than anything that is said by a witness, I mean, the appearance of how he says it, because I am one person that is not persuaded that I can tell by the way a man lifts his eyebrows or the tone of his voice, whether or not he is lying to me. I have had too many liars appear completely plausible and too many people, who ultimately I am convinced were telling the truth look and sound exactly like liars. I am not capable really of doing what our legal tradition assumes that every jury man has an instinct to do, at least I distrust my ability to do it. [Bkrtcy., *Bank of New York v. Olympia & York Equity Corp., Olympia & York Florida Equity Corp., Theodore Gould and Miami Center Joint Venture*, Chief Bankruptcy Judge Thomas C. Britton, Transcript, May 30, 1985, pp. 51-52]

". . . I will tell you what will help me, you see, in oral argument: I am dealing with people that I know and people whose statements to me I attach a great deal of weight to, and if you tell me that the record in front of this Court supports this contention and here is my proposition and here is how I feel about it and here is what I think the Court should do, and if . . . your adversaries do the same thing . . . I will be helped in the direction of trying to reach a decision . . . . [Id., p. 54]

* * * *

"It is clear from the record on appeal that . . . the bankruptcy judge never made the findings of fact necessary to satisfy the

ence of the "clearly erroneous" standard to the findings of fact, proposed by the Bank of New York as the prevailing party and, adopted *in toto* by the bankruptcy

---

requirements of the test cited . . . for equitable subordination and substantive consolidation." [App. 75a, Order of U.S. District Court, December 30, 1985]

"There also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded." [Id., App. 75a] ". . . findings and conclusions are almost non-existent or absent." [Id., App. 71a]

"No confirmation hearing was held on the objections to the Bank's plan. Similarly, no hearing was held on the issues of subordination or classification of appellant's claims and interest, and no opinion was rendered regarding the subordinate classification of O&Y/MCJV's lease claims in spite of the adjudication of their status as owners/lessors of the FF&E. Finally, no hearing was held regarding debtors' and O&Y/MCJV's objection that the Bank's plan was not fair and equitable." [App. 85a, Opinion of the U.S. District Court, June 30, 1986]

* * * *

"Transfer of all or substantially all of the property proposed by the plan to be transferred, assumption by the debtors or the successor to the debtors under the plan of the business or of the management of all or substantially all of the property dealt with by the plan, and commencement of distribution under the plan constitute substantial consummation of the plan under 11 U.S.C. Section 1101." [App. 92a, Order of Bankruptcy Court, April 28, 1986]

* * * *

". . . Trustee's counsel has been directed repeatedly to *bring this case to substantial consummation of the plan* in order that the case may be closed and administrative expense terminated. Last fall, the trustee's counsel anticipated substantial consummation by the first of the year but appears no closer to that objective today." [App. 94a, Order of Bankruptcy Court, March 20, 1987] [Emphasis supplied]

* * * *

". . . it is my view that the debtors including yourself as an individual debtor, have *not* been discharged [Bkrtcy., Transcript, August 17, 1987, p. 33] [See 11 U.S.C. Sections 1141 and 727; and Order of U.S. District Court, March 20, 1986, App. 22a, citing Order of Bankruptcy Court, January 29, 1986, App. 122a-123a]

court, without the introduction of evidence by live witnesses and the opportunity for examination or cross-examination of witnesses concerning substantive consolidation and equitable subordination? [App. 97a] contra., *Federal Rules of Civil Procedure, Rule 52(a)*; *United States v. El Paso Natural Gas*, 376 U.S. 651 (1964); *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

3. Did granting deference to the Bank of New York's proposed findings of fact and conclusions of law, adopted *in toto* by the bankruptcy court, cause the Eleventh Circuit's opinion to be based upon numerous material errors of fact and law, including the conclusion that the plan is substantially consummated and effective relief cannot be granted? [App. 341a, *Errors of Fact and Law*]

4. Are the consequences of the Eleventh Circuit's abandonment of its duty to exercise supervisory control of the bankruptcy court, notwithstanding the constitutional requirements of due process of law, the rules of civil procedure for trial without a jury, and the applicable statutory requirements of the Bankruptcy Reform Act of 1978, as amended, an enlargement of a bankruptcy court's power and authority based upon misconstruction of the law?

5. Did the Eleventh Circuit sanction the bankruptcy court's conduct that the judicial process is whatever ". . . work[s], no matter how screwed up. . . ." in applying the "mootness" doctrine to (a) confirmation of a Plan without a confirmation hearing; (b) denying parties in interest an evidentiary hearing in which they had the opportunity to object to the plan's provisions, taking private property for the benefit of the plan's proponent without consent and without a public purpose, and omitting provision for the payment of federal and state income taxes; (c) affirm *ex parte* material amendments to the Plan; (d) condition a stay on a supersedeas bond in an unattainable amount; (e) adopt *in toto* proposed findings of fact of the prevailing party

without the opportunity to examine or cross-examine witnesses; and (f) implement the Plan to preclude appellate review on the merits, causing the appeal to be dismissed on the grounds of mootness?

6. Does the precedential authority of the Eleventh Circuit's application of the "mootness" doctrine in one appeal provide the basis for dismissing separate appeals of (a) the taking of private property [leased furniture, fixtures, and equipment] from third parties without consent for the benefit of the plan's proponent; (b) determination of the amount, priority, and validity of its disputed lien without having satisfied the statutory requirements of 11 U.S.C. Sections 502 and 506; (c) confiscation of the assets of solvent non-filed affiliated corporations in the absence of consolidation and without adhering to state corporation law; (d) discharge of the liability of federal and state income taxes without payment; and (e) modification of the Confirmation Order's mandate that the Bank of New York's claim was undersecured, granting post-petition interest based upon a provision of the Plan?

7. Does the Eleventh Circuit's application of the "mootness" doctrine in this case grant the bankruptcy court power and authority *not* subject to the constitutional requirements of "due process of law," the Bankruptcy Reform Act of 1978, as amended, applicable state law, and the rules formulated for administration of the federal judiciary? Contra., *Holt v. Henley*, 232 U.S. 637 (1914); *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982).

8. Having granted deference to the Bank of New York's findings of fact, adopted *in toto* by the bankruptcy court, without the testimony of live witnesses, physical or documentary evidence, does the Eleventh Circuit's application of the "mootness" doctrine deny the Petitioners their right to seek reversal or modification on appeal of substantive consolidation and equitable subordination, and

relief based upon redistribution of the Miami Center's sales proceeds in accordance with proper legal priorities, the findings of substantial consummation having been based upon the Petitioners submitting to the court's judgment and the proponent of the plan's material acts of omission in (a) not providing adequate means for the plan's implementation, (b) not disclosing the proper legal priorities of claims, and (c) not providing funds for repayment of (i) court-authorized super-priority loans, (ii) administrative expenses, and (iii) income taxes?

9. Has the Eleventh Circuit "enacted" law, expanding the powers and authority of a bankruptcy court, abandoned its duty to review on the merits the facts and law in this case, and adopted an application of the "mootness" doctrine which is contrary to decisions of the Supreme Court of the United States? ***

*** *Dakota County v. Glidden*, 113 U.S. 222 (1985); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Defunis v. Odegaard*, 416 U.S. 312, 317 (1974); *Aetna Life Insurance Co. v. Hamorth*, 300 U.S. 227 (1937); *North Carolina v. Rice*, 404 U.S. 244 (1971); *Roe v. Wade*, 410 U.S. 113 (1973); *Bakery Drivers v. Wagshall*, 333 U.S. 437 (1948); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

PARTIES TO THE PROCEEDING

The Petitioners are named in the caption.

The following Respondents are the Judges of the United States Bankruptcy Court for the Southern District of Florida who participated in proceedings below: Chief Bankruptcy Judge Thomas C. Britton and Senior Bankruptcy Judge Sidney M. Weaver.

Additional interested parties to the proceedings are the Bank of New York, a New York banking corporation, and Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust.

Pursuant to Rule 28.1, the only Petitioners which are corporations are Holywell Corporation, which has no parent corporation and no subsidiaries or affiliates except wholly-owned subsidiaries, and Miami Center Corporation, a wholly owned subsidiary of Holywell Corporation. Miami Center Corporation has no subsidiaries and its only affiliates are other wholly-owned subsidiaries of Holywell Corporation (none of which were debtors in the Chapter 11 Proceeding).

The Judges (non-respondents) in the District Court who have heard appeals and/or motions in the Chapter 11 Proceeding were Judge Sidney M. Aronovitz, Judge Williams M. Hoeveler, Chief Judge James Lawrence King, Senior Judge C. Clyde Atkins, and Judges Norman C. Roettger, Jr., James W. Kehoe, Kenneth L. Ryskamp, Leonore Nesbitt, Edward B. Davis, Stanley Marcus, Eugene Spellman, and Thomas Scott. The Judges in the Eleventh Circuit Court of Appeals who have heard appeals in the Chapter 11 Proceeding are Judges Anderson, Godbold, Tjoflat, Hatchett and Vance. In addition, Judge Swygert of the Seventh Circuit Court of Appeals and Judge Brown of the Fifth Circuit Court of Appeals have sat by designation on panels of the Eleventh Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	xii
TABLE OF AUTHORITIES	xiv
OPINIONS BELOW	2
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. Conduct Violative Of Due Process Of Law Is Usurpation Of Power And The Proper Remedy Is The Issuance Of Mandamus	15
II. Abandonment Of The Court's Duty To ". . . Find The Facts Specially" And Administer The Rules Of Civil Procedure For Trial Without A Jury Is Properly Remediable Through Mandamus	18
III. Mandamus Is The Proper Remedy For Dissolving The Miami Center Liquidating Trust And Terminating The Appointment Of The Trustee..	21
IV. Mandamus Is The Proper Remedy To Confine Bankruptcy Court To The Lawful Exercise Of Its Limited Jurisdiction And Enforce Compliance With The Confirmation Order's Mandate..	23
CONCLUSION	29

APPENDICES are separately bound with a separate Table of Contents therefor.

TABLE OF AUTHORITIES

Cases: Page

Aetna Life Insurance Co. v. Hamorth, 300 U.S. 227 (1937) xi
Anderson v. City of Bessemer City, 470 U.S. 564 (1985) ..... vii, 19
Bakery Drivers v. Wagshal, 333 U.S. 437 (1948) .. xii, 18
Callaway v. Benton, 336 U.S. 132 (1949) 14, 25
Chicopee Manufacturing Corporation v. Kendall Co., 288 F.2d 719 (4th Cir. 1961) 20
Dakota County v. Glidden, 113 U.S. 222 (1885) .. xi, 17, 18
DeBeers Consolidated Mines Ltd. et al. v. United States, 325 U.S. 212 (1945) 21
Defunis v. Odegaard, 416 U.S. 312 (1974) xi
EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983) 19
Elliot v. Peirsol, 26 U.S. (1 Pet.) 328 (1828) 16
Ex parte United States, 287 U.S. 241 (1932) 2
Federal Communications Commission v. WJR, 337 U.S. 265 (1949) 16
First State Bank and Trust Co. v. Sand Springs State Bank, 528 F.2d 350 (10th Cir. 1976) 24
Fish v. East, 114 F.2d 177 (10th Cir. 1940) 28
Gray v. Sanders, 372 U.S. 368 (1963) 18
Guerin v. Weil, Gotshal & Manges, 205 F.2d 302 (2d Cir. 1953) 28
Hedges v. Dixon County, 50 U.S. 182 (1893) 27
Holt v. Henley, 232 U.S. 637 (1914) x
In re Baker & Getty Financial Services, Inc., 78 B.R. 139 (Bankr. N.D. Ohio 1987) 27
In re Beck Industries, Inc., 479 F.2d 410 (2d Cir. 1983) 24
In re DRW Property Co. 82, 54 B.R. 969 (Bankr., E.D. Mich. 1987) 24
In re Flatbush-Nevins St. Corporation, 133 F.2d 760 (2d Cir. 1943) 24
In re Martin, 26 B.R. 39 (Bankr. S.D. W.Va. 1982) 22

TABLE OF AUTHORITIES—Continued

	Page
In re Memorial Estates, Inc., 797 F.2d 516 (7th Cir. 1986)	23
In re Murchison, 54 B.R. 721 (N.D. Tex. 1985)	24
In re Snider Brothers, Inc., 18 B.R. 230 (Bankr. D. Mass. 1982)	27
In re Texas Consumer Finance Corporation, 480 F.2d 1261 (5th Cir. 1983)	25
In re Unishops, Inc., 494 F.2d 689 (2d Cir. 1984)	24
In re Walsh Construction, 669 F.2d 1325 (9th Cir. 1982)	24
In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 791 F.2d 524 (7th Cir. 1986)	28
In the Matter of Gaslight Club, Inc., 782 F.2d 767 (7th Cir. 1986)	22
Klein v. Board of Tax Supervisors, 282 U.S. 19 (1930)	25
La Buy v. Howe Leather Co., 352 U.S. 249 (1957)	2, 20
Londoner v. City & County of Denver, 210 U.S. 373 (1928)	16
Los Angeles Brush Corp. v. James, 272 U.S. 701 (1927)	20
Mancusi v. Stubbs, 408 U.S. 204 (1972)	xi, 18
Matter of Paso del Norte Oil Co., 755 F.2d 421 (5th Cir. 1985)	25
Matter of William Gluckin Co., 457 F.Supp. 379 (S.D. N.Y. 1978)	14, 24, 25
McClellan v. Carland, 217 U.S. 268 (1910)	2
North Carolina v. Rice, 404 U.S. 244 (1971)	xi
Old Wayne Mutual Life Association v. McDonough, 204 U.S. 8 (1907)	16
Reese v. Beacon Hotel Corporation, 149 F.2d 610 (2d Cir. 1945)	24
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943)	15, 23
Roe v. Wade, 410 U.S. 113 (1973)	xi
Sampsell v. Imperial Paper Corp., 313 U.S. 215 (1941)	24

TABLE OF AUTHORITIES—Continued

	Page
Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946)	25
Securities Industry Association v. Federal Home Loan Bank Board, 588 F. Supp. 749 (D.D.C. 1984)	25
The Official Committee of Equity Security Holders v. Ralph R. Mobey, Examiner, A.H. Robins Company, Incorporated, 832 F.2d 299 (4th Cir. 1987)	23
Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937)	26
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)	ix, 19
United States v. Security Industrial Bank, 459 U.S. 70 (1982)	x
United States v. U.S. Gypsum Co., 333 U.S. 364 (1948)	ix, 19
United States v. W.T. Grant Co., 345 U.S. 629 (1953)	xi
Vallely, Trustee v. Northern Fire & Marine Insurance Company, 254 U.S. 348 (1920)	16
Windsor v. McVeigh, 93 U.S. 274 (1876)	17

Constitution and Statutes

Constitution of the United States, Amendment V	16
Bankruptcy Reform Act of 1978:	
§ 105, 11 U.S.C. § 105	11, 21, 22, 23, 26, 27
§ 502, 11 U.S.C. § 502	x
§ 506, 11 U.S.C. § 506	x
§ 541(a), 11 U.S.C. § 541(a)	21
§ 1104(a), 11 U.S.C. § 1104(a)	v, 11, 21, 22, 23
§ 1123, 11 U.S.C. § 1123	6
§ 1128, 11 U.S.C. § 1128	iii, 15
§ 1141, 11 U.S.C. § 1141	v, 21
28 U.S.C. § 1334(d)	7, 24
28 U.S.C. § 1651	15
28 U.S.C. § 455(a)	14
28 U.S.C. § 372	14
Federal Rules of Civil Procedure, Rule 52(a)	v, vi, 18, 19
Rules of Bankruptcy Procedure, Rule 7052	v, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.——

IN RE THEODORE B. GOULD, HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES, and MIAMI CENTER CORPORATION,
Petitioners

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, CHIEF BANKRUPTCY JUDGE THOMAS C. BRITTON, AND SENIOR BANKRUPTCY JUDGE SIDNEY M. WEAVER

OPINIONS BELOW

The pertinent opinions in the proceedings below are set out in the Appendix hereto. ["App."] Wherever any opinion has been reported, the citation is provided in the Appendix Table of Contents.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review and grant Mandamus to the United States Bankruptcy Court for the Southern District of Florida and may issue writs under 28 U.S.C. Section 1651 in aid of its exercised,[1] or its existing, or prospective appellate jurisdiction. In exercising this power, it may issue

---

[1] *Ex parte United States*, 287 U.S. 241, 246 (1932), citing *"McClellan v. Carland*, 217 U.S. 268, 280 (1910).

the writ to any court [2] over which it has appellate jurisdiction and exercises supervisory control.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of the United States Constitution and the United States Code are set forth in the Appendix hereto at page 408a.

STATEMENT OF THE CASE

1. On *August 22, 1984*, the Petitioners each separately filed a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Reform Act of 1978 in response to the commencement of foreclosure proceedings and lender's malpractices related to the development of commercial real estate, consisting of an office building, hotel, and an inter-connecting shopping mall, referred to as the "Miami Center." The proceedings were assigned to Chief Bankruptcy Judge Thomas C. Britton.

2. On *January 20, 1985*, the Petitioners filed a complaint requesting a jury trial against the Bank of New York, as the lead lender and mortgagee of a construction loan syndicate, alleging fraud under the Racketeering Influenced and Corrupt Organizations Act, usury, breach of good faith, and breach of contract, relating to the lender's liability for malpractices involved in the construction of the Miami Center [Case No. 85-0228-CIV-HOEVELER]

3. On *December 31, 1984*, the bankruptcy court granted a motion of the Bank of New York to treat as "cash collateral," under 11 U.S.C. Section 363, net proceeds inuring to debtors Holywell Corporation and Theodore

---

[2] In *La Buy v. Howe Leather Co.*, 352 U.S. 249 (1957), the power was upheld to issue writs of mandamus for the purpose of exercising the supervisory control "necessary to proper judicial administration in the federal system."

Gould as partners and stockholders from the sale of certain real estate in the Washington, D.C. area owned by non-debtor partnerships and corporate entities. The order provided for determination and payment of federal income taxes to the Internal Revenue Service [App. 223a]

4. On *January 9, 1985*, the Miami Center Limited Partnership was authorized to borrow $3,000,000 from Twin Development, Holywell, and Theodore B. Gould, granting super-priority security for the loan's repayment.[3] Thereafter, an additional loan of $2,489,507.78 was authorized from Theodore B. Gould, granting a super-priority lien for the loan's repayment.[4]

5. On *February 26, 1985*, the Bank of New York filed a proposed Consolidated Plan of Reorganization on behalf of the Petitioners as debtors, amended as of March 22, 1985. The plan was based upon the following principal elements:

(a) Substantive consolidation of the debtors' estates;

(b) Subordination of the claims of the Miami Center Joint Venture and affiliated creditors as "insiders" through a process of classification, without having alleged misconduct as the basis for equitable subordination;

(c) The creation of the Miami Center Liquidating Trust to be established *on behalf* of the debtors on the Plan's "Effective Date" with an individual appointed *after* confirmation as a fiduciary by the court to be designated as "trustee." The powers and authority of the Trustee as a *fiduciary* on behalf of the debtors and as an *assignee* of the *debtors' assets* are specifically enumerated

---

[3] Bkrtcy., *Order On Debtors' Amended Emergency Motion For Authorization To Enter Into Secured Loan Agreement*, January 9, 1985, p. 3.

[4] Bkrtcy., *Order On Emergency Motion For Authorization To Pay Good-Faith Deposit On 1984 Dade County, Florida Real Estate Taxes*, April 1, 1985.

in the Bank of New York's Plan, Article V, *Creation of the Trust.*[5]

In accordance with the requirements of 11 U.S.C. Section 1123, Article IV, *Means For The Execution Of The Plan*, as amended by a Stipulation and Addenda with the Unsecured Creditors' Committees and a Second Amendment's "Funding Agreement" [as modified by the district court's order of October 4, 1985, App. 227a], specifically enumerated the assets designated for the payment of the claims of creditors.[6]

Article IV, *Means For Execution Of The Plan*, also stated that ". . . upon the passing of title of Miami

---

[5] ". . . [vesting in the] Trustee . . . *all property of the estates of the Debtors* within the meaning of *Section 541(a)* of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors . . . to *hold, liquidate, and distribute* such Trust Property *according to the terms* of this Plan . . ."; ". . . (c) Reduce all of the Trust Property *to his possession* and *hold the same*"; (d) Sell and convert the Trust Property to cash and *distribute the proceeds as specified herein*"; and (j) *Release*, convey or assign any right, title or interest in or about the Trust Property"; ". . . (u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them . . ."; ". . . (w) Deal with the Trust Property or any part or parts thereof . . . as would be *lawful* for any person *owning* the same . . . ." and "(x) Take *no action* that would *change the business* of any of the Debtors as conducted at or prior to the filing of the Petitions." [Emphasis supplied] [Plan., pp. 20-24]

[6] (a) The Bank of New York would purchase the land, leasehold improvements, and certain chattels, including the furniture, fixtures and equipment owned by non-filed parties for $255,600,000 and pay the net sale proceeds of the purchase price to the Trustee, taking as a credit, loan amount, accrued interest, including unmatured post-petition interest to the Miami Center's closing.

(b) Upon the passing of the Miami Center's title of the land, leasehold improvements, and chattels to the Bank of New York, the balance would be transferred to the Trust.

(c) A $15,000,000 corporate surety bond, of which the Miami Center Joint Venture is the beneficiary for payment of the improperly subordinated Class 7 Claim.

Center to BNY . . . the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released."

In the Stipulation and Addenda made part of the Plan, as confirmed, the Bank of New York, as an inducement to the unsecured creditors, *assumed the risk* of appellate reversal of provisions of the plan construed contrary to applicable statutory requirements and case law by modifying the definition of the Plan's "Effective Date" from "the date upon which the Order of Confirmation is no longer subject to appeal . . ." to "*the date of confirmation*," thus allowing payment in full of "Undisputed Claims" *immediately* after the modified Effective Date.

No provision was made for the repayment of the court-authorized "Super-priority" loans. No provision was made for the payment of federal income taxes to the Internal Revenue Service and state income taxes to the Commonwealth of Virginia.

6. On *March 20, 1985*, a judgment was entered determining the amount, validity, and extent of the Bank of New York's lien, an adversary hearing having been held on March 14, 1985, without testimony of witnesses or evidence, concluding that (1) the lien of the Bank of New York was superior to any other claim, contrary to the contractual loan documents and applicable statutes of Florida lien law, and (2) that "the accrued interest on the loans, unilaterally determined by the Bank at the contract [good standing] rate" calculated, including unmatured interest, based upon the Bank's "published prime rate" [7] was $33,103,184.24 as of March 14, 1985. [App. 186a]

---

[7] The actual "contract rate" upon which the interest expense of $112.5 million in the loan's face amount was defined in the contractual loan documents as follows:

> "The prime rate is the minimum commercial lending rate charged from time to time by the Bank of New York for 90-day loans to responsible and substantial commercial borrowers." [BNY Claims No. 228-232]

Neither the amount of the disputed *claim* ". . . as of the date of the filing of the petition," nor the amount to which, if any, the value of its collateral in the debtors' property exceeded its claim was determined. The bankruptcy court's order is subject to a pending appeal in Case No. 85-2263-CIV-ROETGER.

7. On *April 11, 1985*, the debtors filed a motion objecting to the feasibility of the Bank of New York's proposed Consolidated Plan of Reorganization, stating that the proposed Plan did not provide "*adequate means*" for its implementation, including an objection to the failure to provide for the establishment of a reserve and payment of the debtors' federal and state income tax liabilities in an estimated total amount of $20,763,841 [*11 U.S.C. Section 1123(a)(5); Debtors' Motion To Withdraw From Consideration The Plan of Reorganization Of The Bank of New York*, April 11, 1985]

8. On *April 29, 1985*, the bankruptcy court deferred the scheduled confirmation hearing. [Bkrtcy., Transcript, p. 4]

9. On *June 24, 1985*, the Category "A" and "B" furniture, fixtures, and equipment leases between the Miami Center Joint Venture ("MCJV", a solvent non-filed Florida partnership), as Lessor, and Petitioner MCLP, as Lessee, were held "true leases",[8] quieting MCJV's title,

---

[8] The bankruptcy court's findings of fact were as follows:

"If . . . the two leases are not 'true leases,' . . . the Bank will come out of reorganization at least $10 million ahead of what it stands to receive if the two leases are given effect. This would be a complete windfall for the Bank."

"No rent has ever been paid on the leases."

"It has not been suggested that Gould had anything to gain by leasing the equipment rather than by purchasing it with borrowed funds collateralized by the equipment."

"There is nothing in the record before me that suggests that anyone was misled or deceived by the leases in question here. Certainly the Bank was not misled or deceived in any way." [App. 137a]

and not, as had been alleged by the Bank of New York, unperfected security agreements. MCJV's general partners are Theodore Gould and Olympia & York Florida Equity Corp.

10. On *July 23, 1985*, the bankruptcy court approved substantive consolidation, stating in relevant part as follows:

> "The consolidation of the five estates is for the purpose of allowing *all available funds* and *assets of the estates* to be used in accordance with the Bank's amended plan. . . ." [Emphasis supplied]

Substantive consolidation was limited to the consolidation of the property of the debtors' estates. *28 U.S.C. Section 1334(d)*. Substantive consolidation was approved as an equitable doctrine in which ". . . the debtor entities . . . would not be demolished or destroyed." [App. 244a, Transcript, July 18, 1985] In relevant part, the bankruptcy court made the following statement:

> ". . . the predicate for the assertion that the assets of Holywell properly are subject to the claims of the other entities is the link through Gould. If Gould, in fact, controls, and I assume that the word 'controls' also is 'owns,' I mean 'own and controls,' has the power to dispose of the assets of Holywell and if he simultaneously, in the same capacity, is indebted to those other entities, isn't that the same thing as saying that Holywell is indebted to those others." [Id., App. 242a-243a]

During the substantive consolidation hearing, the bankruptcy court acknowledged that ". . . there might be adverse tax consequences . . ." as a result of implementation of the Bank of New York's Plan.[9] [App. 244a-245a]

---

[9] The uncontroverted testimony of witnesses was as follows:

(a) The assets and liabilities of the various debtors were segregated and consolidated accounting statements had not been prepared [App. 235a-238a, 242a].

[Continued]

11. On *August 8, 1985*, without notice, a Confirmation Order was entered of the Bank of New York's proposed plan of reorganization filed on behalf of the debtors, and numerous material amendments were approved *ex parte*, in which the following pertinent findings of fact were stated:

(a) The Bank of New York's claim was undersecured.

(b) The subordination of the Miami Center Joint Venture and affiliated creditors was approved.

(c) The Plan, as amended, ". . . does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the Bank's plan." [App. 246a]

12. On *August 12, 1985*, the bankruptcy court appointed Mr. Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust [App. 251a]

13. On *September 23, 1985*, the bankruptcy court conditioned a stay upon posting a $140 million supersedeas bond on October 3, 1985. The debtors having been unable to post, as an alternative, a $50 million bond for a 90-day period, the stay expired on October 10, 1985.

14. On *September 27, 1985*, a declaratory judgment was entered that certain chattels, leased as furniture, fixtures, and equipment, including telecommunications sys-

---

[9] [Continued]

(b) Each individual debtor was a separate taxable entity and filed separate income tax returns [App. 234a-235a, 237a-238a].

(c) Audits segregated each of the Miami Center Limited Partnerships' creditors. [App. 234a-237a, 241a-242a]

(d) Holywell's books and records were maintained in its office, located in Virginia, and the Miami Center Limited Partnership's financial records in Florida [App. 238a].

(e) Control and ownership of the Miami Center Limited Partnership was exercised by a majority vote of individual limited partners; the partnership interests of Holywell Corporation and Theodore B. Gould lacked voting rights concerning the partnership's major decisions. [App. 230a-234a, 239a-292a]

tems, were owned by Holywell Leasing Company and Holywell Telecommunications Company, wholly-owned subsidiaries of Holywell Corporation.[10] [App. 167a]

15. On *October 10, 1985*, the Trustee, on behalf of the Miami Center Liquidating Trust, conveyed title of the land, leasehold improvements, and certain chattels owned by the Miami Center Limited Partnership for $255.6 million, pursuant to an Amended Contract of Sale, in which the Bank of New York acknowledged that the Trust did not have possession and could not convey title of the leased furniture, fixtures and equipment owned by the Miami Center Joint Venture, Holywell Telecommunications Company, and Holywell Leasing Company.[11]

(a) The Bank of New York drafted the *Closing Statement*, taking a credit, for unmatured interest of *$27,050,115.02*, representing post-petition interest of an undersecured claim.

(b) A Closing Letter was executed, deferring the closing's consummation. As of the filing of this Petition, the closing adjustments have not been completed.

---

[10] The bankruptcy court's findings of fact were as follows:

"The Bank's argument that Gould is not to be viewed as an innocent party and that his multiple entities served to give him an advantage to the detriment of his creditors does not overcome the fact that the windfall it [the Bank] could receive if there were no other way to avoid this claim is not justified under these facts."

"I also find that the Bank's argument that Gould engaged in a 'shell game' where a lessee/lessor relationship never existed does not meet the burden of proof to support its counter-claim that the leases were in fact financing agreements." [App. 168a]

[11] The Amended Contrast of Sale, Paragraph 25:

"The Purchaser is fully familiar with the status of the record in the Bankruptcy Proceedings and the property rights vested in the Seller in accordance with the United States Bankruptcy Code and the Plan, and thereby said Purchaser recognizes that the Seller, Miami Center Liquidating Trust, can deliver, in accordance with this Agreement, only such title, items, chattels and matters that it has received by operation of law from the Debtor and Debtors in Possession, and that this Agreement is governed by said limitations."

(c) The Bank of New York granted the Trustee a Letter of Indemnity, holding him harmless

> ". . . for any claims against said liquidating trustee, as a result of the execution of the contract . . . or any other provisions of the Plan."

16. On *December 30, 1985*, the Petitioner's appeal was remanded. The district court defined the criteria for substantive consolidation and equitable subordination for the purpose of having the bankruptcy court make the necessary findings of fact and conclusions of law for appellate review. The Bank of New York's motion to dismiss on the grounds of mootness was denied.[12] [App. 65a]

---

[12] The district court's findings of fact and conclusions of law were as follows:

> *"Where, as here, the debtors' assets have been sold by the Liquidating Trustee, Section 363(m) is not applicable."*
>
> *"The order regarding substantive consolidation is clearly not one approving a sale of property; . . . Should this court rule, after remand of this matter, in favor of the appellants on their appeal from the consolidation order, it can grant meaningful relief to the appellants by reversing the order, . . .* For these reasons, *the debtors' appeal of the bankruptcy court's* order *approving substantive consolidation is not moot, ..."*
>
> "Reversal of the bankruptcy court's ruling on the *equitable subordination* of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing would . . . return these entities to their preconfirmation status; here, this would result in the three creditors being given the higher priority for their claims accorded to 'arm's length' creditors.
>
> *Denial of the Liquidating Trustee's authority to dismiss the appellants' district court suit would simply allow the action to remain viable, ..."*
>
> "The debtors' appeal is not a frivolous one and that, absent compelling cause, the interest of justice would best be served by allowing the appellants an opportunity to present their appeal from a fully developed record below."
>
> "The property was sold *not* to a disinterested, third party purchaser, but to the appellee itself, through its designee . . . Although the Miami Center is now held by the Bank's designee. . . ."

17. On *January 29, 1986*, the bankruptcy court amended its Confirmation Order *nunc pro tunc*, adopting verbatim the Bank of New York's proposed findings of fact and conclusions of law [App. 96a], based upon an evidentiary hearing in which the Bank of New York, having the burden of proof, did not present any evidence on substantive consolidation or equitable subordination [App. 258a, Transcript, January 18, 1986]. The proposed findings of fact were *not* based upon credibility determinations of witnesses' testimony, physical or documentary evidence.

18. On *March 20, 1986*, the district court, citing *Anderson v. City of Bessemer City*, *supra* [App. , Footnote 3] applied the "clearly erroneous" standard of review and affirmed the *Order of Substantive Consolidation* and the *Confirmation Order*, amended *nunc pro tunc*, thereby granting deference to the Bank of New York's proposed findings of fact and conclusions of law.

The district court expressly excluded any holding as to the subordination of claims and the court-ordered taking of the property of the Miami Center Joint Venture, Holywell Leasing Company, and Holywell Telecommunications Company. It also excluded reference to the debtors' appeal of the amount, validity, and priority of the Bank of New York's lien.

Numerous appellate issues (and in the bankruptcy court) were ignored, including (a) The denial of due process of law inherent in the failure to hold a statutorily mandated confirmation hearing, with notice and an opportunity for all parties to be heard and to cross-examine witnesses; (b) The creation, without statutory authority, of the Miami Center Liquidating Trust, vesting property and a "receiver's" powers in a post-confirmation "trustee," without adherence to 11 U.S.C. Section 1104(a) and in direct violation of 11 U.S.C. Section 105(b); (c) The improper use of assets of non-debtor affiliated corporations to pay claims against Miami

Center Limited Partnership, in the absence of consolidation and contrary to state corporation law concerning satisfaction of third party obligations of such non-debtor corporations, including federal and state income taxes; and (d) The benefits enriching the Bank of New York from substantive consolidation and subordination.

19. On *June 30, 1986*, the district court, having previously affirmed quieting of title to the Miami Center Joint Venture's chattels leased to the Miami Center Limited Partnership, remanded MCJV's appeal of the Confirmation Order. [App. 83a]

20. On *November 10, 1986*, the bankruptcy court adopted *in toto* the Bank of New York's proposed findings of fact and conclusions of law, amending the Confirmation Order *nunc pro tunc*, including allegations of misconduct against Olympia & York and Theodore B. Gould. [App. 264a] The Bank of New York's Disclosure Statement had not alleged misconduct, no witnesses testified or introduced evidence of misconduct; and Theodore B. Gould was neither a party to the appeal nor represented by counsel.

21. On *February 20, 1987*, the bankruptcy court's order was affirmed granting the Trustee sole authority to exercise control over Twin Development Corporation's cash, the district court having adopted equitable estoppel *sua sponte* as the basis for concluding that Holywell Corporation and Theodore B. Gould were estopped from exercising their legal rights as aggrieved parties to preclude transfer of Twin Development's assets in the absence of consolidation and without adhering to state corporation laws. Twin Development was *not* a party nor represented by counsel [App. 190a]. Twin Development was *not* a party nor represented by counsel in the appeal to the Eleventh Circuit. [App. 201a, Order of March 18, 1988]

22. On *March 20, 1987*, an order was entered directing the Trustee to immediately repay the super-priority loans

(See paragraph 4, above) in the amount of $4,717,404, plus accrued interest, and, in denying reconsideration on April 1, 1987, the bankruptcy court stated:

> "—the substantive consolidation of the five estates, provided in the plan, did not extinguish any of the post-petition claims presently under consideration. I remain persuaded that this would be an impermissible interpretation of the Bank's plan. The district court reached the same conclusion after hearing the same argument. If this result was in fact intended by the Bank when it presented this plan, it should have been made explicit. I would not have confirmed a plan nullifying the 1985 orders that are at issue here."

23. On *March 24, 1987*, the Confirmation Order, as amended *nunc pro tunc* on November 10, 1986, was reversed. [App. 144a].

24. On *April 27, 1987*, the district court, having affirmed the bankruptcy court's decision quieting title to the leased furniture, fixtures, and equipment owned by Holywell Leasing Company and Holywell Telecommunications Company [App. 167a, Order of September 27, 1985], remanded the case to hold further adversarial hearings concerning the Plan's subordination of claims for payment of rent and the taking of their property without consent. [App. 170a]

25. On *June 27, 1987*, (See paragraph 24, above), the bankruptcy court adopted *in toto* the Bank of New York's proposed findings of fact and conclusions of law, including allegations of misconduct, alleging "constructive fraudulent transfers." No witnesses testified on behalf of the Bank of New York, alleging misconduct. The allegations of misconduct were directly contrary to the court's prior findings [App. 167a, Order of September 27, 1985] and the adversarial hearings' uncontroverted evidence. [App. 300a, Transcript, June 15, 1987]

26. On *August 4, 1987*, Theodore B. Gould, as Complainant, filed a Complaint Of Judicial Misconduct to the

Judicial Council of the Eleventh Circuit concerning the bankruptcy court's *ex parte* conference on May 15, 1987, [See p. vi, fn. **, above, App. 336a] in accordance with the Federal Judicial Discipline Act [28 U.S.C. Section 372]. Chief Bankruptcy Judge Britton responded to the Complaint on August 24, 1987. The Complainant filed a reply to Bankruptcy Judge Britton's response on September 5, 1987. No corrective action has been taken. No report has been made. No report of findings of fact has been made.

27. On *August 27, 1987*, a Petition For Mandamus was granted compelling the recusal of Bankruptcy Judge Britton in Case No. 85-3230-CIV-ATKINS and as a result thereof Bankruptcy Judge Britton recused himself from all matters in these Chapter 11 proceedings based upon 28 U.S.C. Section 455(a).

28. On *December 18, 1987*, the bankruptcy court ruled that ". . . the Bank of New York was *not* undersecured." [App. 202a] Thus, the court has varied its decree and the mandate of its Confirmation Order [See paragraph 11(a), above]

29. On *January 20, 1988*, the United States District Court for the Western District of Virginia, having denied various motions to dismiss and transfer, concluded that the bankruptcy court did not exercise jurisdiction over controversies concerning Twin Development Corporation's assets and stock.[13] Nevertheless, the bank-

---

[13] ". . . Twin's corporate affiliation with the debtors cannot support the bankruptcy court's extension of jurisdiction beyond the parties involved in the proceedings before it. *Matter of William Gluckin Co.*, 457 F.Supp. 379, 383 (S.D.N.Y., 1978), citing *Callaway v. Benton*, 336 U.S. 132, 142 (1949)." [Twin Development Corporation v. Fred Stanton Smith, *et al.*, Order, January 20, 1988]

"The bankruptcy court apparently relies heavily on a statement of continuing jurisdiction which has been written into the reorganization plan. This court's judgment is that reliance is badly misplaced. The case law holds squarely . . . jurisdiction may not be conferred on a bankruptcy court by inclusion of

ruptcy court has, asserted jurisdiction and certified to the district court a finding of civil contempt against Petitioner Gould and his attorney for failing to cause Twin Development Corporation to dismiss the Virginia action. [App. 218a]

REASONS FOR GRANTING THE WRIT

The Petitioners contend that the Eleventh Circuit's panel, in dismissing their appeal of the Confirmation Order on the grounds of mootness, improperly concluded that substantial consummation precluded effective relief, sanctioned the bankruptcy court's usurpation of power, conduct violative of due process, and action nullifying the rules of procedure for trial without a jury for the purpose of preventing effective appellate review of this case on its merits.

The Petitioners' proposed relief in petitioning for review by an extraordinary writ of mandamus under the All Writs Statute of the Judicial Code of 1948, 28 U.S.C. Section 1651, is consistent with the scope of *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943), namely:

> "The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

I. CONDUCT VIOLATIVE OF DUE PROCESS OF LAW IS USURPATION OF POWER AND THE PROPER REMEDY IS THE ISSUANCE OF MANDAMUS.

The statutory requirements of 11 U.S.C. Section 1128, are consistent with the constitutional rule of law stated as follows:

---

continuing jurisdiction statements in any reorganization plan . . . . I think that reliance by the bankruptcy court is badly misplaced." [*Twin Development Corpordation v. Fred Stanton Smith, et al.*, Transcript, January 5, 1988, p. 72]

> "The right to a hearing or an opportunity to be heard within the requirement of the due process clause ordinarily includes the right of a party to be present, during the taking of testimony or evidence, and to appear or be repersented by counsel. Such right also includes the opportunity to know the claims of his opponent, hear evidence introduced against him, cross-examine witnesses, introduce evidence in his own behalf, and present proper argument as to law and fact." See 16A C.J.S. Constitutional Law Section 622, pp. 824-825, citing *inter alia*, *Londoner v. City & County of Denver*, 210 U.S. 373 (1928) and *Federal Communications Commission v. WJR*, 337 U.S. 265 (1949).

The bankruptcy court's deferral of the confirmation hearing, and issuance of a Confirmation Order without notice and hearing, must be construed as conduct violative of due process of law.

A. Lack of Jurisdiction.

The principle upon which the Petitioners rely in this case, particularly as applied to the United States of America, Commonwealth of Virginia, Miami Center Joint Venture, Holywell Telecommunications Company, Holywell Leasing Company, Twin Development Corporation, and other affiliated non-debtor corporate entities, that the judgment and orders of a bankruptcy court must be treated as a nullity, as applied to exercise of jurisdiction not granted by Congress has been stated as follows:

> "If consent can confirm jurisdiction, why not initially confer jurisdiction? . . . For a court to extend the act to [unincluded] corporations . . . is to enact a law, not to execute one. . . ."
>
> "Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. *Elliot v. Peirsol*, 1 Pet. 328, 344; *Old Wayne Mutual Life*

Association v. McDonough, 204 U.S. 8." 254 U.S. at 35. *Vallely, Trustee* v. *Northern Fire & Marine Insurance Company*, 254 U.S. 348. (1920)

B. Lack of Notice.

Since the Confirmation Order was issued without notice, and parties in interest did not have the opportunity to object to their treatment under the proposed plan, and examine or cross-examine witnesses, the bankruptcy court lacked authority to enter an order, adversely affecting the interests of the United States of America, Commonwealth of Virginia, Miami Center Joint Venture, Holywell Leasing Company, Holywell Telecommunications Company, Twin Development Corporation, and non-filed solvent corporations affiliated with a debtor:

> "That there must be notice to a party of some kind, actual or constructive, to a vaild judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter." *Windsor v. McVeigh*, 93 U.S. 274, 277, 278 (1876).

C. Misapplication of The "Mootness" Doctrine.

The Eleventh Circuit's application of the "mootness" doctrine has improperly sanctioned the bankruptcy court's conduct, expressed by the Bankruptcy Judge as follows:

> ". . . one great strength that the Bankruptcy Court has . . . is that if an order of this Court is not superseded and that order is performed, then it cannot be challenged any further . . . and if we had been able to carry out the entire plan very quickly, there would have never been an appeal because they couldn't post the bond." [App. 338a-339a]

(1) It is a rule of law that by staying within the bounds of the law appellants do not thereby lose their right to seek reversal and recover through restitution assets improperly taken without due process of law. *Dakota County v. Glidden*, 13 U.S. 222, 224 (1885);

Bakery Drivers v. Wagshal, 333 U.S. 437 (1948); *Mancusi v. Stubbs*, 408 U.S. 204 (1972).[14]

(2) It has been established that the cessation of activities or conduct which would be contrary to a court's order 'does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *Gray v. Sanders*, 372 U.S. 368, 376 (1963); *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 202-203 (1968); [the above case was re-affirmed by the court in *DeFunis v. Odegaard*, 416 U.S. 312, 316-317 (1974)].

II. ABANDONMENT OF THE COURT'S DUTY TO ". . . FIND THE FACTS SPECIALLY" AND ADMINISTER THE RULES OF CIVIL PROCEDURE FOR TRIAL WITHOUT A JURY IS PROPERLY REMEDIABLE THROUGH MANDAMUS.

The bankruptcy court's adoption *in toto* of the Bank of New York's proposed findings of fact and conclusions of law, as the prevailing party, is directly contrary to the Federal Rules of Civil Procedure, Rule 52(a), *United*

---

[14] In *Mancusi*, the rule of law concerning "mootness" was stated, in relevant part, as follows:

> "Much earlier the Court has stated a similar view of mootness in these circumstances. 'There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedes bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal.' [citing *Dakota County v. Glidden, supra*] Under these circumstances the case is not moot, and we turn to the merits." 408 U.S. at 207, 33 L.Ed. 2d at 298.

States v. U.S. Gypsum Co., 333 U.S. 364 (1948),[15] and *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964), citing Judge J. Skelly Wright.[16]

The District Court, in opinions of March 20, 1986 [App. 11a] and March 24, 1987 [App. 144a], and the Eleventh Circuit, in its opinion of March 10, 1988 [App. 42a], granted deference of the "clearly erroneous" standard to the prevailing party's findings, adopted *in toto* and not based upon determinations of the credibility of live witnesses, or upon physical or documentary evidence admitted through testimony or stipulation. Thus, these courts have sanctioned the bankruptcy court's abandonment of its duty under FRCP Rule 52, as adopted in Bankruptcy Rule 7052. The resulting misapplication of *Anderson v. City of Bessemer City, supra*, has nullified the rules promulgated for trial without jury.

Of special relevance is the precedent of *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 640-641 (4th Cir., 1983), cited in *Anderson*, stating:

> "Nor is that disquiet, prompted by by the trial court's adoption of one party's findings and conclusions, relieved by any statement in such findings and

---

[15] "It was intended in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice . . . . The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, *when dependent upon oral testimony* where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court." 333 U.S. at —— [Emphasis supplied]

[16] ". . . Rule 52 says the court shall prepare the findings. 'The court shall find the facts specially and state separately its conclusions of law' . . . . Many courts simply decide the case in favor of the plaintiff or defendant, have him prepare the findings of fact and conclusions of law and sign them . . . . *This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a non-compliance with Rule 52 specifically and it betrays the primary purpose of Rule 52*—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the law suit." 376 U.S. at 656-7 [Emphasis supplied]

> conclusions that the trial court had individually considered them because it believed them to be factually and legally correct." 698 F.2d at 633.

The procedure of adopting verbatim one party's proposed facts, without any formal hearing and opportunity to offer objections, cross-examination, or rebuttal is, in and of itself, a denial of due process of law guaranteed by the Fifth Amendment of the Constitution. *Chicopee Manufacturing Corporation v. Kendall Co.*, 288 F.2d 719, 724-725 (4th Cir., 1961).

In seeking a Writ of Mandamus to vacate the bankruptcy court's abuse of power and conduct violative of due process in adopting *in toto* the Bank of New York's proposed findings of fact, the Petitioners rely upon the following precedent:

> "'[w]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 citing *Los Angeles Brush Corp. v. James*, 272 U.S. 701, 106 (1927)

Also, *Los Angeles Brush Corp., supra* at 706, stated, in relevant part, as follows:

> "If it clearly appeared . . . that a practice had been adopted by district judges . . . at variance with the equity rules, our writ might well issue to such judges."
>
> "Rule 46 requires that in any trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or the rules, and that the Court shall pass upon the admissibility of all evidence offered as in actions at law."
>
> "These rules were adopted by this Court after a thorough revision . . . . Were it to find that the rules have been practically nullified by a district judge, or by concert of action on the part of several

district judges, it would not hesitate to restrain them."

III. MANDAMUS IS THE PROPER REMEDY FOR DISSOLVING THE MIAMI CENTER LIQUIDATING TRUST AND TERMINATING THE APPOINTMENT OF THE TRUSTEE.

In *DeBeers Consolidated Mines Ltd. et al. v. United States*, 325 U.S. 212 (1945), the propriety of the issuance of a writ of mandmaus to preclude usurpation of power was stated as follows:

> ". . . when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of Section 262." [325 U.S. at 217]

(a) The bankruptcy court's creation of the Miami Center Liquidating Trust, in confirmation of the amended plan of reorganization, constituted conduct lacking statutory authority. The Plan's Article V, *Creation of Trust*, vested in this trust the debtors' Section 541(a) assets, contrary to 11 U.S.C. Section 1141(b) requiring that assets not specifically enumerated in Article IV, *Means For The Execution Of The Plan*, as necessary to implement the Plan, be revested in the discharged debtors. In addition, a "trustee" appointed after confirmation, without satisfying the requirements of 11 U.S.C. Section 1104(a), was granted the powers and authority of a "receiver," contrary to 11 U.S.C. Section 105(b).

(b) The requirements for appointment of a trustee in a Chapter 11 proceeding are specified in 11 U.S.C. Section 1104(a).[17]

(1) The requirements of 11 U.S.C. Section 1104(a) were not satisfied. A non-bankruptcy "contract" trustee was appointed *after* confirmation. Notwithstanding the lack of statutory authority, a trust for the payment of claims was created without consent and the plan's Second

---

[17] The statutory requirements are specified in App. 410a-411a.

Amendment granted authority to issue a Trustee's Certificate, increasing the debtors' liabilities for the purpose of purchasing and conveying assets to the Bank of New York's designee free and clear of liens.

(2) The appointment of a trustee without satisfying 11 U.S.C. § 1104(a) has been considered in *In re Martin*, 26 B.R. 39 (Bankr. S.D. W.Va. 1982). The court stated:

> Neither the facts of this case nor the law justifies creation of a new entity known as "successor" to the debtor in possession. The alternatives available under the Code include the appointment of a trustee, appointment of an examiner, and conversion or dismissal of the case. No reported opinion under the new Code has ventured beyond these options for disposition of a Chapter 11 case. 26 B.R. at 39-40.

The court considered and rejected the possibility that appointment of a successor might be permitted under 11 U.S.C. Section 105(a).

In the Matter of Gaslight Club, Inc., 782 F.2d 767 (7th Cir. 1986) endorsed *Martin*. *In Gaslight*, the Seventh Circuit approved the appointment of a "successor" to the debtors pursuant to 11 U.S.C. Sections 105(a) and 1104(a) *only* because there was "consent on all sides to the procedure followed." 787 F.2d at 772.

(c) The trustee's improper appointment is clear because Article V, *Creation of the Trust*, grants powers and authority to the trustee equivalent to a "receiver" under the Bankruptcy Act, as set forth in Rule 201.[18]

In enacting the Bankruptcy Reform Act of 1978, Congress specifically provided that "[n]otwithstanding subsection (a) of this section [i.e., the broad equity powers of the Court], a bankruptcy court may not appoint a

---

[18] "(1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter when no trustee has qualified or the interest of the trustee may be adverse to that of the estate."

receiver in a case under this title." *11 U.S.C. Section 105(b)*

(1) In a pertinent discussion of 11 U.S.C. 105(b), the Seventh Circuit in *In re Memorial Estates, Inc.*, 797 F.2d 516 (7th Cir. 1986), stated:

> "As the legislative history explains, 'the bankruptcy code has ample provision for the appointment of a trustee [i.e. under Section 1104] when needed. *Appointment of a receiver would simply circumvent the established procedures.* 797 F.2d at 519 [Emphasis supplied]

(d) In the absence of having satisfied the requirements of 11 U.S.C. Section 1104(a) and without statutory authority for creation of the Miami Center Liquidating Trust, the bankruptcy court's equitable powers emanating from 11 U.S.C. Section 105(a) cannot be construed as granting ". . . a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules." *The Official Committee of Equity Security Holders v. Ralph R. Mobey, Examiner,* A.H. Robins Company, Incorporated, 832 F.2d 299 (4th Cir. 1987)

IV. MANDAMUS IS THE PROPER REMEDY TO CONFINE THE BANKRUPTY COURT TO THE LAWFUL EXERCISE OF ITS LIMITED JURISDICTION AND ENFORCE COMPLIANCE WITH THE CONFIRMATION ORDER'S MANDATE.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1954), states:

> "The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." 319 U.S. at 26.

The limits of the bankruptcy court's authority in exercise of its jurisdiction have been specifically defined by Congress and precedent have uniformly held:

> Bankruptcy courts have limited jurisdiction. A bankruptcy court's ". . . power to act must be found expressly or implicitly in the Bankruptcy Act." *First State Bank and Trust Co. v. Sand Springs State Bank*, 528 F.2d 350, 353 (10th Cir., 1976)
>
> A Bankruptcy Court's jurisdiction is limited to "the debtor and his property, wherever located." [See 28 U.S.C. Section 1334(d)]

A. A Bankruptcy Court's Post-Confirmation Jurisdiction Is Limited.

> Congress did not intend that the Bankruptcy Court should, after an approval of a plan . . . have power to remain a wet-nurse to the reorganized company. A bankruptcy court cannot obtain that power merely by inserting a provision reserving jurisdiction. *In re Flatbush-Nevins St. Corporation*, 133 F.2d 760, 762 (2nd Cir., 1943).

This rule was reiterated in *Reese v. Beacon Hotel Corporation*, 149 F.2d 610 (2nd Cir., 1945):

> ". . . we have repeatedly held that reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court." [citations omitted]149 F.2d at 611.

B. The Bankruptcy Court Lacks Jurisdiction Over The Assets of A Debtor Parent's Non-Filed Corporate Subsidiaries.

Without "piercing the corporation veil," in the absence of the consolidation of the assets and liabilities of Holywell's non-filed solvent subsidiaries as a sham, alter-ego or based upon a fraudulent transfer of assets,[19] the

---

[19] *Sampsell v. Imperial Paper Corp.*, 313 U.S. 215 (1941); *In re Walsh Construction*, 669 F.2d 1325 (9th Cir., 1982); *In re Beck Industries, Inc.*, 479 F.2d 410 (2nd Cir., 1983); *In re Unishops, Inc.*, 494 F.2d 689 (2nd Cir., 1984); *Matter of Wm. Gluckin Company, Ltd.*, 457 F. Supp. 379, 383 (S.D.N.Y., 1978); *In re DRW Property Co. 82*, 54 B.R. 969 (Bktcy., E.D. Mich., 1987); *In re Murchison*, 54 B.R. 721 (N.D. Tex., 1985).

bankruptcy court lacked subject matter jurisdiction over controversies concerning the assets of Holywell Leasing Company, Holywell Telecommunications Company, Twin Development Corporation, and other affiliated corporate entities.[20]

(1) There is no clearer rule of law than that, in the absence of consolidation, a court should not disregard the separate identities of a parent and its subsidiary corporation, even a wholly-owned subsidiary. *Securities Industry Association v. Federal Home Loan Bank Board*, 588 F. Supp. 749, 754-755 (D.D.C., 1984) A corporation's identity cannot be disregarded and its assets cannot be applied to the obligations of others. As stated in *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946):

> "While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages." 326 U.S. at 437

The assets of non-filed corporate subsidiaries cannot be treated as the assets of its stockholder. In *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24 (1930), Mr. Justice Oliver Wendell Holmes, Jr. stated:

> "[I]t leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and *its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members.*" [Emphasis supplied]

---

[20] *Calloway v. Benton*, 336 U.S. 132 (1949); *Matter of Paso del Norte Oil Co.*, 755 F.2d 421 (5th Cir., 1985); *In re Texas Consumer Finance Corporation*, 480 F.2d 1261 (5th Cir., 1983), *Matter of Wm. Gluckin Company, Ltd., supra* 383.

(2) The court-ordered taking of the assets of Holywell Telecommunications Company and Holywell Leasing Company [21] for the Bank of New York's benefit is conduct violative of due process and usurpation of power. In *Thompson v. Consolidated Gas Company*, Mr. Justice Louis Brandeis reiterated the constitutional rule of law adopted as follows:

> ". . . one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Co.*, 300 U.S. 55 (1937).

C. Substantive Consolidation Is A Judicial Doctrine For Which Without Consent In The Absence of "Piercing The Corporate Veil" There Is No Statutory Authority.

Substantive consolidation is a judicial doctrine, lacking statutory authority, based up a bankruptcy court's general equity powers. *11 U.S.C. Section 105(a)*. *In re*

---

[21] "The confirmed plan consolidated the assets and liabilities of the related estates in a liquidating trust and provided a liquidating trustee to apply the consolidated assets to the consolidated liabilities, thereby explicitly eliminating all interentity claims:

> 'As a result of the substanve consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.' Amended Consolidated Plan, Art. II (C.P. No. 479)
>
> "The two claimant/plaintiffs are wholly-owned subsidiaries of the debtor Holywell Corporation, which is in turn wholly-owned and totally controlled by the debtor Gould as are each of the remaining debtors. Under the confirmed plan, therefore, *the claim in question here is owned by the Liquidating Trust and is owed by the Liquidating Trust.*" [Emphasis supplied] [Bkrtcy Order On Remand, June 27, 1987]

Baker & Getty Financial Services, Inc., 78 B.R. 139, 141 (Bkrtcy., N.D. Ohio, 1987), explained that a bankruptcy court's authority to order consolidation derives from 11 U.S.C. Section 105(a) and "substantive consolidation is the merger of separate entities into *one* so that the assets and liabilities of both parties may be aggregated to effect a more equitable distribution of property among creditors."

A review of case law indicates that the consolidation of Holywell Corporation's assets with the Miami Center Limited Partnership for the purpose of paying claims against the Partnership is the only case in which substantive consolidation has been applied *without* consent in the absence of piercing the corporate veil.

(1) *In re Snider Brothers, Inc.*, 18 B.R. 230, 234 (Bankr. D. Mass., 1982) expressed the reason for a court's "sparing" application of substantive consolidation as an equitable doctrine allowing the creditors of one debtor entity to reach the assets of another debtor.[22] Without consent, the substantive consolidation of Holywell Corporation and Chopin Associates with the Miami Center Limited Partnership for the purpose of paying claims against the Partnership, the elimination of ground rent payable to Chopin with a priority superior to the Bank of New York's lien, and the elimination of valid "insider" claims against the Partnership, is contrary to the rule of law *equitas sequitur legum. Hedges v. Dixon County*, 50 U.S. 182 (1843).[23]

---

[22] "It is a power which should be used sparingly for while the term has a disarmingly innocent sound, consolidation in bankruptcy is no mere instrument of procedural convenience, but a measure vitally affecting substantive rights . . . ."

[23] ". . . whenever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation . . . ."

In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, 791 F.2d 524, 528 (7th Cir., 1986), the court stated in relevant part:

> ". . . the fact that a proceeding is equitable does *not* give the judge a free-floating discretion to redistribute rights in accordance with his personal views . . . ."

The limitations of a bankruptcy court's equitable power were stated by Judge Augustus Hand in *Guerin v. Weil, Gotshal & Manges*, 205 F.2d 302, 304 (2nd Cir., 1953) as follows:

> "Although it has been broadly stated that a Bankruptcy Court is a court of equity (citation omitted), the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act."

(2) Without the consent of Holywell Corporation and Chopin Associates, in the absence of "piercing the corporate veil," there is no case law and no statutory rule upon which the bankruptcy court had authority to substantively consolidate the debtors. None of the factors exist for piercing Holywell Corporation to use its assets to satisfy claims against the Miami Center Limited Partnership. *Fish v. East*, 114 F.2d 177 (10th Cir., 1940)

D. Varying The Findings of the Court's Former Decree On "Undersecurity" Is Abuse Of Judicial Power.

If the bankruptcy court's improper exercise of its authority to revise the finding of its former decree, upon which the Confirmation Order's mandate is based, finding that "the Bank of New York . . . whose claim is undersecured" is affirmed on appeal, the plan's confirmation will be followed by the liquidation of the discharged debtors, non-payment of the claims of the non-filed sub-

ordinated creditors, and the dissolution of the Miami Center Liquidating Trust without the payment of federal and state income tax liabilities.

CONCLUSION

For the foregoing reasons, Petitioners pray:

1. That a Writ of Mandamus issue from the Supreme Court of the United States to the Bankruptcy Court For The Southern District of Florida, to Thomas C. Britton, Chief Bankruptcy Judge of said court, and Sidney M. Weaver, Senior Bankruptcy Judge of said court, requiring Thomas C. Britton and Sidney M. Weaver, to show cause on a day fixed by this Court why Mandamus should not issue from the Supreme Court of the United States for the following purposes:

(a) Directing Chief Bankruptcy Judge Thomas C. Britton to vacate as a nullity the Order of Substantive Consolidation and findings of fact adopted *in toto* on remand concerning equitable subordination [January 29, 1986]; and (b) Directing Senior Bankruptcy Judge Sidney M. Weaver to (i) dissolve the Miami Center Liquidating Trust and (ii) vacate the Order Appointing a Trustee [August 12, 1985], (iii) vacate the Order that the Bank of New York was *not* undersecured [December 18, 1987] (iv) redistribute the Miami Center's sale proceeds in accordance with proper legal priorities, and (v) limit the bankruptcy court to the exercise of its prescribed jurisdiction as the administration of timely filed pre-petition claims.

2. That Petitioners have such additional relief and process as the Supreme Court of the United States may find necessary and appropriate in the foregoing premises.

Respectfully submitted,

ROBERT M. MUSSELMAN *
413 7th Street, NE
Charlottesville, Virginia 22901
Telephone (804) 977-4500
Attorney for Petitioners Holywell Corporation, Miami Center Limited Partnership, Chopin Associates and Miami Center Corporation

THEODORE B. GOULD, *pro se*
Echo Hill Farm
Garth Road
Charlottesville, Virginia 22901
Telephone: (804) 295-7125

*Counsel of Record